OCT 23 1944
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 498.

EMIL J. SONDERLICK,
Plaintiff-Petitioner,

—against—

THOMAS H. SIMMONS, *et al.*,
Defendants,

THOMAS J. HALLINAN,
Defendant-Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

SAMUEL C. DUBERSTEIN,
Counsel for Respondent,
26 Court Street,
Brooklyn, New York.

WALTER F. LEE,
Attorney for Respondent,
9004 161st Street,
Jamaica, New York.

THE COURT PRESS, N. Y. C.

INDEX.

PAGE

Facts 1

POINT I—The respondent took possession of the real property and collected the rents therefrom under the express direction and authority of the court and he cannot be sued for damages for doing so 5

POINT II—The petitioner was not deprived of his property without due process of law; he participated on the merits in the receivership proceedings and is bound by the resulting adjudications 7

POINT III—The petitioner having no right, legal or equitable, in the real property in question can in no event recover damages for the receiver's taking possession thereof and collecting the rents thereform 8

POINT IV—The merits and equities are all with the respondent. Petitioner upon the motion for summary judgment to dismiss his complaint, failed to establish the existence of triable issues of fact as required by Rule 113 of the Rules of Civil Practice of the State of New York 9

CONCLUSION 9

Table of Cases Cited:

	PAGE
Armstrong v. *Langmuir*, 2 Cir., 6 F. 2d 369	8
Buckley v. *Harrison*, 10 Misc. (N. Y.) 683	6n
Central Trust Co. v. *Pittsburg, S. & N. R. R. Co.*, 223 N. Y. 347	5
Davis v. *Gray*, 16 Wall. 203, 21 L. Ed. 452	6
Dodwell & Co. Inc. v. *Silverman*, 234 App. Div. 362	9
Dwan v. *Massarene*, 199 App. Div. 872	9
Dyker Heights Home for Blind Children, Inc. v. *Stolitzky, et al.*, 250 App. Div. 229	7
Fallon v. *Egberts Woolen Mills Co.*, 56 App. Div. 585	5
Henderson v. *Henderson*, 247 N. Y. 428	7
Lafayette Trust Company v. *Beggs*, 213 N. Y. 280	6
Noe v. *Gibson*, 7 Paige 513	6
Walling v. *Miller*, 108 N. Y. 173	6

Other Authorities Cited:

Civil Practice Act of the State of New York, Section 974, Subdivision 2	1
Rules of Civil Practice of the State of New York, Rule 113	9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 498.

EMIL J. SONDERLICK,
Plaintiff-Petitioner,

—against—

THOMAS H. SIMMONS, *et al.*,
Defendants,

THOMAS J. HALLINAN,
Defendant-Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The Facts.

Petitioner brought this action to recover of the defendants damages predicated upon the alleged deprivation by them of his real property and the rents and profits thereof through means of an alleged improper and illegal receivership. The respondent was named defendant because he was the receiver of the real property in question appointed by an order of the Supreme Court of the State of New York, Queens County, dated January 16, 1941, made pursuant to Section 974, subdivision 2, of the Civil Practice Act (Exhibit D, pp. 48-52*). For a clear understanding

* All references to exhibits, pages or folios from record on appeal in the Appellate Division, First Department.

of the respondent's position, it is necessary at this point to refer to the following proceedings:

By a complaint verified June 29, 1939 (fol. 302), Juanita Gelly brought an action against Anna Kalamon and Joseph Kalamon, who were alleged to be the owners of the property in question (fol. 294), and Theodore A. Dylewski, for the specific performance of a certain agreement involving such property (pp. 102-105). (For convenience, the foregoing action will be hereafter referred to as the "Gelly" action.) The petitioner appeared as the attorney for Anna Kalamon. A judgment in plaintiff's favor in said action was signed by default on November 2, 1939 (fol. 279). This judgment was resettled on December 15, 1939 (fol. 274). While the foregoing action was pending undetermined and on September 8, 1939, Anna Kalamon conveyed the property to the petitioner, her attorney in the action (fols. 98, 102, 103).

Thereafter in September 1939, Joseph Kalamon commenced an action against his wife, Anna Kalamon, and the petitioner to set aside the foregoing conveyance alleging that she conveyed the property "to her attorney, Emil J. Sonderlick, without consideration, with full knowledge on the part of both defendants of the plaintiff's rights and in further attempt to defraud the plaintiff of his interest therein, * * *" (fol. 114). The petitioner and Anna Kalamon defaulted in said action. A motion for judgment by default was granted over their opposition (fol. 251), and an interlocutory judgment was made on February 5, 1941 declaring the conveyance from Anna Kalamon to the petitioner "cancelled of record, and the said transfers hereby set aside for all purposes, * * *" (Exhibit J, pp. 66-67). Petitioner then moved to vacate said interlocutory judgment. This was granted on March 21, 1941 (fol. 252). The plaintiff, Joseph Kalamon, appealed and the Appellate Division, Second Department, reversed (fol. 255). On June 16, 1941, said appellate court denied petitioner's application for reargument of said appeal and thereafter on July 7, 1941 a final judgment in said action

was made and entered on July 11, 1941 (Exhibit K, pp. 68-71). A final judgment dismissing the petitioner's appeal therefrom was entered by the County Clerk of Queens County on October 23, 1941 (Exhibit IV, p. 106).

The respondent was not in any way involved in the foregoing proceedings. He came into the picture for the first time when he was appointed receiver in the *Gelly* action by an order dated January 16, 1941 (Exhibit D, pp. 48-52). This was only 20 days before the interlocutory judgment dated February 5, 1941 in the case of *Kalamon* against petitioner and Mrs. Kalamon to set aside the conveyance to the petitioner. This order was made on actual notice to the petitioner since he was served with the motion papers as attorney for Anna Kalamon. Petitioner submitted his own affidavit in opposition to said application (fols. 144-145), in which he asserted his ownership of the premises (fols. 97-98). He *personally* thereafter moved to vacate the order appointing the respondent receiver (fol. 162), and there admitted that the motion papers for the appointment of a receiver were addressed to him as attorney for Anna Kalamon and again asserted that she had no interest in the property since she conveyed it to him on September 8, 1939 (fol. 103). His motion was denied (Exhibit F, pp. 54-55). Petitioner appealed to the Appellate Division from such denial. Said court affirmed the determination and petitioner made no further attempts to review it (fol. 34).

Respondent continued to act as receiver in the *Gelly* action until his account was judicially settled by an order dated June 23, 1942 (Exhibit G, pp. 56-58). Petitioner on his own behalf and on behalf of Anna Kalamon opposed the application for respondent's discharge and once again raised the questions concerning his ownership. The motion was, however, granted by the aforesaid order dated June 23, 1942. Petitioner appealed to the Appellate Division, Second Department, from said order. Said appellate court affirmed and in its order of affirmance dated December 30, 1942 (Exhibit H, pp. 59-60) recited "the above

named Anna Kalamen, defendant, and Emil J. Sonderlick, *a party, in this action*, having appealed * * *" (fols. 177-178, italics supplied). Petitioner's motion in the Appellate Division for leave to appeal to the Court of Appeals from the foregoing order of affirmance was denied (fol. 321).

The complaint in the action brought by the petitioner, verified May 26, 1942, contains seven counts. The respondent is involved only in the 3rd, 5th, 6th and 7th causes of action (fols. 68-73, 78-86). The first two causes of action are solely against the plaintiff in the *Gelly* action and her attorney therein and are based upon an alleged contempt proceeding which they had prosecuted against the petitioner. The third cause of action is against Gelly, Simmons and the respondent. There, Gelly and Simmons alone are charged with having wrongfully and maliciously procured in the *Gelly* action the order appointing the respondent receiver. All that the respondent is charged with is that following his appointment and "by virtue of the said order" (fol. 71), he wrongfully etc., took possession of the premises and obtained the rents and profits thereof. The fourth cause of action is against Gelly and another attorney. The fifth cause of action is against the respondent "and the other defendants in possession of the said premises" (fol. 78). There the respondent is charged with having entered the premises on January 16, 1941 and ousted the plaintiff therefrom and obtained the rents and profits thereof. The sixth cause of action is solely against the respondent, and there again he is charged with having entered the premises on or about January 16, 1941 and carried away, without plaintiff's authority or permission or consent, the rents and profits of the property. In the seventh cause of action, the respondent alone is named and here once more he is charged with having entered the premises on January 16, 1941 and subsequent thereto, and of collecting the rents and profits therefrom.

The respondent's answer consists of a general denial and two affirmative defenses: (1) that he acted as agent

for and by order of the Supreme Court, Queens County, and his account as receiver has been settled and approved and that the petitioner's challenge of his action in taking possession of the premises under the order appointing him had been overruled by prior determinations on the merits; and (2) that the petitioner had no interest in the property as his deed thereto had been cancelled by the judgment dated February 5, 1941 in the action: Kalamon v. Anna Kalamon and petitioner (Exhibit J, p. 66).

POINT I.

The respondent took possession of the real property and collected the rents therefrom under the express direction and authority of the court and he cannot be sued for damages for doing so.

By his appointment as receiver, the respondent did not take title to the property or to the rents therefrom but merely became the agent of the court to collect and hold them subject to its order (fol. 154). The property was in *custodia legis* and so it remained until the receiver was discharged. (*Central Trust Co.* v. *Pittsburg, S. & N. R. R. Co.*, 223 N. Y. 347, 359.)

As was stated in *Fallon* v. *Egberts Woolen Mills Co.*, 56 App. Div. 585 at p. 587:

> "Where property comes into the hands of a court officer by an order or decree of the court, the court will protect its officer from actions at law. In *Parker* v. *Browning* (8 Paige 388), it is held: 'If a receiver takes possession of goods under the express directions of the court, * * * the court will assume the exclusive jurisdiction of the subject, and will not suffer the receiver to be sued at law for taking such goods.' In 2 Story's Equity Jurisprudence (§833a) it is said: 'In the next place, when such a receiver is in posses-

sion under the process or authority of the court in execution of a decree or decretal order, his possession is not to be disturbed even by an ejectment under an adverse title without the leave of the court. For his possession is deemed the possession of the court; and the court will not permit itself to be made a suitor in a court of law.'"

Davis v. *Gray*, 16 Wall. 203, 217, 21 L. Ed. 452; *Noe* v. *Gibson*, 7 Paige 513; *Walling* v. *Miller*, 108 N. Y. 173.

Had the petitioner interfered with the property in the possession of the receiver, he would have been in contempt of court. (*Lafayette Trust Company* v. *Beggs*, 213 N. Y. 280, 286.) How then can the respondent, as receiver, be held personally responsible for obeying the order of the court and possessing himself of the property and its avails as therein directed? He was not responsible for obtaining the order. According to the petitioner's own allegations in his complaint, it was the defendant Gelly and her attorney who moved for and obtained the receivership in the *Gelly* action (fol. 70). It is inconceivable that a receiver thus appointed as agent for the court should be placed in a position of peril merely by obeying the terms of the order of his appointment. It would impose upon him the duty of determining whether his appointment was legal and thereby would place him in the anomalous position of questioning the order of the court for which he was acting.*

* It is to be noted that this suit is based upon a complaint verified May 26, 1942 (fol. 90) which antedates the receiver's discharge by the order dated June 23, 1942 (fol. 166). The complaint does not allege leave of court to sue its receiver. (*Buckley* v. *Harrison*, 10 Misc. (N. Y.) 683 at pp. 688, 689.)

POINT II.

The petitioner was not deprived of his property without due process of law; he participated on the merits in the receivership proceedings and is bound by the resulting adjudications.

Petitioner's claim that a receiver could not be appointed in the *Gelly* action because he was the owner of the property and not his client and that he was not a party to the action, has been passed upon adversely in three separate adjudications prior to that sought to be reviewed here.

In each of the foregoing adjudications, the question was directly involved and none did he attempt to review by certiorari to this court. Now, more than three years after the affirmance by the Appellate Division, Second Department, in June 1941 of the order denying petitioner's motion to vacate the receivership, he attempts to review such determination in a different and collateral action.

It is respectfully submitted that he is bound by the prior adjudications. He not only disputed the merits of (1) the original application for the appointment of a receiver by stating that he and not his client was the owner of the property, but he (2) personally moved to vacate the receivership upon such ground and (3) reiterated such claim when he personally opposed the receiver's application to settle his account and to have himself discharged. A person who disputes the merits of a motion in a proceeding or action is estopped from denying the jurisdiction of the court over his person after having become an actor in the suit by his participation therein. (*Henderson* v. *Henderson*, 247 N. Y. 428; *Dyker Heights Home for Blind Children, Inc.* v. *Stolitzky, et al.*, 250 App. Div. 229.)

As was stated in *Armstrong* v. *Langmuir*, 2 Cir., 6 Fed. (2d) 369, 371, by Hand, *J.*:

> "A man may not say that he is not properly before the court, and in the same breath argue that, if he be, there is no ground to hold him. Courts have found an inconsistency in such an attitude which has led them to insist that a motion upon the merits presupposes that the party is before the court."

POINT III.

The petitioner having no right, legal or equitable, in the real property in question can in no event recover damages for the receiver's taking possession thereof and collecting the rents therefrom.

It is to be noted that the petitioner obtained a deed to the property from Anna Kalamon on September 8, 1939 prior to the interlocutory judgment made in the *Gelly* action on November 2, 1939 and that this deed was nullified by the judgment of the Supreme Court, Queens County, dated February 5, 1941, in the action prosecuted by Joseph Kalamon against the petitioner and Anna Kalamon. The receiver was appointed by an order dated January 16, 1941, or some 20 days prior to such judgment. By such judgment not only was the deed cancelled of record and the transfer set aside for all purposes, but the petitioner and Mrs. Kalamon were directed to account for all monies received by them and derived from the conveyance (fols. 199-201). This judgment nullified the deed and whatever rights the petitioner obtained by the conveyance of September 8, 1939 so that as of the time that the respondent took possession of the premises, as receiver under the order of the court, the petitioner had no interest in the property which could bottom the claims for damages asserted in his complaint. Since the judgment in the *Kalamon* case, in which he was concededly named a party defendant, is

now the law of the case, petitioner cannot possibly establish an interest in the real property in question sufficient to predicate a recovery for unlawful deprivation.

POINT IV.

The merits and equities are all with the respondent. Petitioner upon the motion for summary judgment to dismiss his complaint, failed to establish the existence of triable issues of fact as required by Rule 113 of the Rules of Civil Practice of the State of New York.

Upon a motion under the foregoing Rule, the sole question to be determined is whether there is an issue to be tried. (*Dwan* v. *Massarene*, 199 App. Div. 872, 879.) The petitioner was called upon in response to the motion for summary judgment to assemble and reveal his proofs for the purpose of showing that his complaint had merit and the facts thereof were capable of being established at the trial. (*Dodwell & Co. Inc.* v. *Silverman*, 234 App. Div. 362.) The petitioner was unsuccessful in establishing such proof and showing that there was merit to his action. Indeed, all of the proof appearing in the record presented a question of law which the New York courts have properly determined.

CONCLUSION.

The adjudication sought to be reviewed herein did not result from a construction or application of the Constitution of the United States and in any event there is no important question of law to be decided. The petition should be dismissed, with costs.

Respectfully submitted,

SAMUEL C. DUBERSTEIN,
Counsel for Respondent.